86 - 1046

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOSEPH J. SANTACROCE, Sheriff of Nassau County; and WALTER J. FLOOD, Warden of Nassau County Correctional Center, individually and in their official capacities,

Petitioners,

vs.

HERBERT BADGLEY, JAMES BARNES, MITCHELL CHAPMAN, ROBERT GUNSBERG (a/k/a ROBERT ALVINO), MAURICE McCORKLE, FRANK RICCHIUTI, OSCAR RODRIGUEZ and HENRY SMITH, inmates of the Nassau County Correctional Center and EUGENE CHAPMAN, LEE McCORKLE and KATHERINE RICCHIUTI, members of inmates' families, individually and on behalf of all persons similarly situated; WILLIAM G. McMAHON, Chairman, New York State Commission of Correction; and THOMAS A. COUGHLIN, III, Commissioner, New York State Department of Correctional Services, individually and in their official capacities,

Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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EDITOR'S NOTE

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TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Citations	iii
Regulatory Provisions Involved..	vii
Statement of the Case	1
Summary of Argument	9
Reasons for Denying Writ	12
I. As the District Court's determination was riddled with mistaken impressions of the applicable law the Court of Appeals properly set it aside and, since the record plainly did not support a finding of impossibility, upheld the remedial order as a matter of law.	12
II. The Second Circuit's direction neither espoused a "'hostage' theory of contempt" nor conflicts in the least with the decision of another court of appeals.	27
III. The coercive sanction directed in the mandate is neither arbitrary nor ambiguous, or otherwise improper.	31

IV. The Court of Appeals followed this Court's policy of judicial restraint toward the administration of correctional facilities..... 40

Conclusion 46

TABLE OF CITATIONS

Page

Cases Cited:

Anderson v. City of Bessemer City, N.C., 470 U.S. _____, 84 L.Ed.2d 518 (1985) 18

Anderson v. Dunn, 6 Wheat 204, 5 L.Ed. 242 (1821) 41

Badgley v. Santacroce, 800 F.2d 33 (2d Cir. 1986) 6,7,8, 9,10, 20,30, 31,32, 42,46

Badgley v. Varelas, 729 F.2d 894 (2d Cir. 1984) [Badgley I] 2,3,4, 12,21, 24,30, 40,42

Baumgartner v. United States, 322 U.S. 665 (1944) 16,17

Benjamin v. Malcolm, No. 75 CIV. 3073 (S.D.N.Y. Oct. 31, 1983) .. 38

Benjamin v. Malcolm, No. 75 CIV. 3073 (S.D.N.Y. Nov. 4, 1983) ... 40

Berger v. Heckler, 771 F.2d 1556 (2d Cir. 1985) 39,40

Bigelow v. Virginia, 421 U.S. 809 (1975) 14

Bose Corp. v. Consumer's Union of U.S. Inc., 466 U.S. 485 (1984) . 16,18, 19

Dean v. Coughlin, 804 F.2d 207 (2d Cir. 1986) 42

Duran v. Elrod, 713 F.2d 292 (7th Cir. 1983) 40

Fortin v. Commissioner, 692 F.2d 790 (1st Cir. 1982) 25

Halderman v. Pennhurst State School and Hospital, 526 F. Supp. 423 (E.D.Pa. 1981) 37,38

Harrington v. DeVito, 656 F.2d 264 (7th Cir. 1981) cert. denied. 455 U.S. 993 (1982) 19

Hutto v. Finney, 437 U.S. 678 (1978) 33,34, 36

Inmates of Allegheny County Jail v. Wecht, 754 F.2d 120 (3rd Cir. 1985) 34,35

In re Adams, 63 N.Y.2d 868 (1984) 21

In re Weiss, 703 F.2d 653 (2d Cir. 1983) 8,15

Jewel Tea Co. v. Kraus, 204 F. 2d 549 (7th Cir. 1953) 19

Lemon v. Kurtzman, 441 U.S. 192 (1973) 19

Local Firefighters v. Cleveland, 478 U.S. ____, 92 L.Ed.2d 405 (1986) 43

Maggio v. Zeitz, 333 U.S. 56 (1948) 23,24

McComb v. Jacksonville Paper Co., 336 U.S. 187 (1949) 15,19

Miller v. Carson, 524 F. Supp. 1174 (M.D. Fla. 1981) 21

Miller v. Fenton, 474 U.S. ____, 88 L.Ed.2d 405 (1985) 17

Mobile County Jail Inmates v. Purvis, 481 F. Supp. 222 (S.D. Ala. 1984) 37,38

Mucha v. King, 792 F.2d 602 (7th Cir. 1986) 20

Newman v. Graddick, 740 F.2d 1513 (11th Cir. 1984) 27,28

Oriel v. Russel, 278 U.S. 358 (1929) 24

Perfect Fit Industry, Inc. v. Acme Quilting Co., 673 F.2d 53 (2d Cir.) cert. denied. 49 U.S. 832 (1982) 43

Pesaplastic, C.A. v. Cincinnati Milacron Co., 799 F.2d 1510 (11th Cir. 1986) 45

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 13

Ruiz v. Estelle, 679 F.2d 266 (1982), modified on other grounds, 688 F.2d 266 (1982), cert. denied., 460 U.S. 1042 (1983) 41

Shillitani v. United States, 384 U.S. 364 (1966) 41

United States v. Armour & Co., 402 U.S. 673 (1971) 44

United States v. ITT Continental Baking Co., 420 U.S. 223 (1975) 44

United States v. Rylander, 460 U.S. 752 (1983) 16,28

United States v. Singer Manufacturing Co., 374 U.S. 174 (1963) 16

United States v. Swingline, 371 F. Supp. 37 (E.D.N.Y. 1974) 26

United States v. United Mine Workers, 330 U.S. 258 (1947) ... 32,36

United States v. United States Gypsum Co., 333 U.S. 364 (1948) 13

United States v. Wendy, 575 F.2d 1025 (2d Cir. 1978) 25

Statutes Cited:

N.Y. Correct. Law, 504(1) (McKinney Supp. 1986) 4,6,13, 15,21, 23

Rules Cited:

Fed. R. Civ. P. 52(a) 9

9 New York Code of Rules and Regulations section 7300.6(b) .. 21

REGULATORY PROVISIONS INVOLVED

9 New York Code of Rules and Regulations section 7300.6(b). Procedures

> (b) It shall be the responsibility of the administrator of an affected facility to identify another facility or a suitable place within the county which may be designated as a substitute jail for such facility. If such suitable place exists, he shall communicate its existence to the commission.

No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

Joseph J. Santacroce, Sheriff of Nassau County; and Walter J. Flood, Warden of Nassau County Correctional Center, individually and in their official capacities,

Petitioners,

vs.

Herbert Badgley, James Barnes, Mitchell Chapman, Robert Gunsberg (a/k/a Robert Alvino), Maurice McCorkle, Frank Ricchiuti, Oscar Rodriguez and Henry Smith, inmates of the Nassau County Correctional Center and Eugene Chapman, Lee McCorkle and Katherine Ricchiuti, members of inmates' families, individually and on behalf of all persons similarly situated; William G. McMahon, Chairman, New York State Commission of Correction; and Thomas A. Coughlin, III, Commissioner, New York State Department of Correctional Services, individually and in their official capacities,

Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Brief in Opposition

STATEMENT OF THE CASE

This section 1983 class action

concerning overcrowding at the Nassau County Correctional Center ("NCCC") was nearly into its fifth year when the amended judgment was signed in October 1984. It had been settled by a consent judgment entered October 7, 1981, but there followed "three years . . . without compliance." Badgley v. Varelas, 729 F.2d 894, 903, n. 10, 897, 899-900 (2d Cir. 1984) ("Badgley I"). The original judgment was intended to finally resolve the inmates' claims of unconstitutional overcrowding against the defendant Sheriff and Warden by expansion of capacity through construction of dormitory units and addition of second bunks in many cells, with assurances that the population, to be controlled in the first instance by durational limitations on the use of double-celling and a ban on the use of cots and mattresses in common areas, would not exceed an established cap and

that essential services would be provided. Id. at 896.

In February 1984, in Badgley I, the Second Circuit reversed remedial orders directed against certain State defendants not parties to the judgment, "in view of the availability of a remedy that may be directed solely to the parties who signed [it]." Id. at 901. The court found that at least with respect to violation of the population cap "the time for prompt and effective action had arrived" (id. at 903, n. 10), but concluded that an order providing for the release of inmates was "not warranted." Id. at 902. Rather, it mandated a "prohibition on intake" calculated to "rapidly secure compliance with [the] population limit" and "serve the salutory purpose of forcing all of the various state and local agencies who either have a need to place people in confinement or the responsibility for

providing detention facilities, or both, to face up to the challenge of making alternative arrangements." Id. With respect to the anticipated effects of the remedial order, the court wrote:

> If the NCCC were closed today because of a natural disaster such as fire or disease, we have little doubt that the responsible officials of New York State and Nassau County would figure out some way to confine tomorrow those arrested by the police and sentenced by the courts. The persistent violation of the population limit of the consent judgment - a violation now entering a fourth year - is an equivalent disaster.

Id., citing N.Y. Correction Law section 504, subdivision 1 of which provides for use in such emergencies of "another suitable place within the county or the jail of any other county" as a "substitute jail."

The District Court held a hearing on the effective date of the remedial order and thereafter modified the judgment,

inter alia, by increasing the population cap (25a).[1] The amended consent judgment that followed (1a-16a) redefined the maximum in-house population. There were 992 (instead of 939) approved bedspaces, but the in-house population might not exceed 710 plus the number of inmates actually housed (up to 157) in the theretofore underpopulated dormitories. Thus, the maximum in-house population was generously increased from 808 to 867. The judgment incorporated, in paragraph 31, the remedial order originally entered at the Second Circuit's direction, with appropriate numerical adjustments and an exception for acceptance (but not exclusion from the count) of the most serious alleged offenders. It also eased the limitations on double-celling. In

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[1]References in parentheses followed by the letter "a" are to the petitioners' appendix.

return, the defendants agreed to a five-year construction and renovation program (25a-26a).

On October 7, 1985, the defendants began housing inmates in excess of 710 in the core facility cells (19a). Since this violated the pivotal population cap (paragraph 4), and perforce the very specific directive in paragraph 31, the inmates filed the motion at issue.

The defendants waived their right to a hearing and the motion was decided on the material facts not in dispute (id.). The defendants asserted, inter alia, a shortage of bedspace in the jails of other counties for the transfer of additional inmates (the practice had been effected on a large scale since 1981) under Correction Law section 504(1). With reference to the use of other buildings within the County as substitute jails, the defendants initially claimed that such buildings were

not available, but later conceded that the obstacles were political (community opposition), the very same considerations that had stalled the construction program at the jail itself (29a). The defendants presented no evidence whatsoever of any efforts to obtain substitute facilities within Nassau County (id.).

The District Court found that the defendants had made "every reasonable effort to comply with the directions in the decree and in particular with the order to keep the inmate population below the maximum of 710" (19a-20a). It was "impossible for them to comply . . . without the assistance of the state officials" (20a). Compliance (with paragraph 31, the remedial order) would conflict with the defendants' statutory duties (id.). Their failure to comply (with the more general directive of paragraph 4, the population cap) was not

"a willful disobediance" [id., quoting In re Weiss, 703 F.2d 653, 660 (2d Cir. 1983)].

The District Court further found that the State, as opposed to the County defendants, had the power to relieve the overcrowding (id.). It invited further motions and stated that "upon a showing that state officials are violating the constitutional rights of the inmates, the court will consider appropriate measures to insure compliance with the decree" (21a).

Given what must be considered a topsy-turvy view of the relevant law in the District Court, and recognizing that the case, which had been argued four times in the circuit court (three before Judge Newman), had become "a Dickensian saga of prison overcrowding and beaurocratic excuse and delay" (24a), the Second Circuit reversed and simply directed that

the remedial provision it had drafted in 1984 be put into effect, after a 30-day delay but with the imposition of substantial sanctions in the event of noncompliance (32a-33a).

SUMMARY OF ARGUMENT

The Court of Appeals corrected the District Court's misapprehension of a remedial order directed by it several years earlier and of various determinative legal principles. Accordingly, there was no misapplication of Rule 52(a). In any event, the conclusion of impossibility in this jail overcrowding context was independently reviewable, especially by an appellate panel very familiar with the case and the intractable problems underlying it.

Petitioners' "'hostage' theory" objection to implementation of the remedial prohibition on intake is baseless

because petitioners are subject to the court's very specific directive and there is nothing to indicate that compliance with it, although perhaps difficult, is impossible. The objection would have properly been, in any case, directed at the remedial order itself, not its re-implementation with a directive that it is to be enforced. Petitioners not only failed to seek reconsideration or review of the remedial order entered in 1984, but affirmed their commitment to it by its inclusion in the amended consent judgment.

The mandate includes the specification of a sanction very obviously designed to coerce compliance. It is prospective and the nexus between it and the remedial order could not be more direct. The court's direction that the damages be assessed in favor of the plaintiff class

rather than paid into the U.S. Treasury is not objectionable. The District Court, if need be, is fully capable of distributing the money in an appropriate manner implementing the aims of the injunction issued on respondents' behalf or otherwise redressing the respondents' complaints in this case.

The remedial order and the more recent directive to re-implement it are actually examples of judicial restraint and due deference to correctional authorities, especially in light of the dearth of progress made during the many years since the action commenced. Most significantly, petitioners' protestations to the contrary notwithstanding, the mandate can accomplish its intended purpose, and, as petitioners in relating the more recent history largely concede, has done so already.

REASONS FOR DENYING THE WRIT

I.

As the District Court's determination was riddled with mistaken impressions of the applicable law the Court of Appeals properly set it aside and, since the record plainly did not support a finding of impossibility, upheld the remedial order as a matter of law.

Petitioners propose a constricted definition of the appropriate appellate function in this case, wherein the Court of Appeals, after properly reviewing the record in its entirety, enforced a remedial order previously entered at its direction. Not having bothered to seek reconsideration or review of the order carefully fashioned in Badgley I, petitioners had affirmed their own commitment to it in the amended consent decree, then risked contempt by disregarding it. The District Court, convinced that the Court of Appeals' unimpeachable assignment of responsibility

to the parties bound by the judgment, and primarily responsible under State law, was incorrect, bottomed its refusal to enforce the unambiguous and absolute requirements of paragraph 31 on a purported conflict between the petitioners' obligations under the judgment and their duties under State law. The court misapprehended the terms of the remedial order, the operation and effect of New York law in this regard, and the law with respect to petitioners' authority under New York's Correction Law section 504(1) as well. These "errors of law," relevant to the enforcement of the prohibition on intake, the Court of Appeals could "of course, correct." United States v. United States Gypsum Co., 333 U.S. 364, 394 (1948). "[T]he record permit[ting] only one resolution of the factual issue" [Pullman-Standard v. Swint, 456 U.S. 273, 292 (1982)], the court

properly directed appropriate relief. See, e.g., Bigelow v. Virginia, 421 U.S. 809, 826-27 (1975).

The District Court, however, had focused its decision less pointedly and reached the unfounded conclusion that the petitioners were unable to comply based upon their good faith efforts to maintain the population below the ceiling in paragraph 4. Finding that they had made "every reasonable effort" in this regard, short of compliance with paragraph 31, the court concluded that their failure "was not a willful disobedience of the decree" (19a-20a). Again, petitioners misconstrue the Court of Appeals' decision, which reversed the District Court's ill-conceived determination. Reliance on lack of willfulness, that is, on good faith alone, as a defense is a clear misreading of the settled law on civil contempt. See

McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949). Nothing in In re Weiss, 703 F.2d 653 (2d Cir. 1983), cited by the District Court, suggests otherwise. Similarly, the conclusions of the District Court are infected by erroneous, although not specifically stated, views of the settled law on impossibility (27a-28a) and the burden of production of evidence of it sufficient to raise a question of fact (31a). Finally, the court's misunderstanding of the operation of Correction Law section 504 and of the division of responsibility for prisoners between the County defendants and State agencies contributed to the findings regarding paragraph 4 as well. Since the court misapprehended the legal standard and principles involved, the Court of Appeals was not bound by the clearly erroneous standard and properly reversed as a matter

of law. See United States v. Singer Manufacturing Co., 374 U.S. 174, 194, n.9 (1963); Bose Corp. v. Consumers Union of U.S. Inc., 466 U.S. 485, 501 (1984) ("Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law").

Alternatively, the determination of impossibility of compliance in a case such as this "clearly implies the application of standards of law" Baumgartner v. United States, 322 U.S. 665, 671 (1944). The burden to produce evidence showing "categorically and in detail" that compliance was impossible [United States v. Rylander, 460 U.S. 752, 755 (1983)] "would be lost" in such a case if "whether

that exacting standard of proof had been satisfied on the whole record were deemed to be a 'fact' of the same order as all other 'facts,' not open to [independent] review . . . ." Baumgartner v. United States, supra, 322 U.S. at 671.[2] Since "the relevant legal principle [here] can be given meaning only through its application to the particular circumstances of [the] case, [this] Court [would be] reluctant to give the trier of facts' conclusions presumptive force and, in so doing, strip [the] federal appellate court of its primary function as an expositor of the law." Miller v. Fenton, 474 U.S. ____, ____, 88 L.Ed.2d 405, 413

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[2] The appellate court was, it happens, quite familiar with the history of this case. After oral argument of the inmates' appeal of the 1984 modifications, the panel withheld decision while Judge Newman acted as a mediator in discussions leading to entry of the amended consent judgment, after which the appeal was withdrawn.

(1985). That was, in part, the role the Court of Appeals played here, in a case which it had followed closely over a period of years, and it was especially fitting for it to do so as "the substantive law at issue" is one where "the stakes - in terms of impact on future cases and future conduct - are too great to entrust [even the largely factual questions] finally to the judgment of the trier of fact." Bose Corporation v. Consumers Union of United States, Inc., supra, 466 U.S. at 501, n.17.[3]

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[3] It should also be noted that, notwithstanding the Court of Appeals' own labeling of its conclusions those of the District Court were "clearly erroneous" under Rule 52(a). Its "interpretation of the facts [was] illogical [and] implausible." Anderson v. Bessemer City, 470 U.S. ___, ___, 84 L.Ed.2d 518, 530 (1985). It was not one of "the permissible views." Id., 84 L.Ed.2d at 528.

Surely, in this regard, the Court of Appeals was also aware that the standard for review of the denial of civil contempt (cont'd)

As the Court explained in Bose, supra, 466 U.S. at 501, n. 17:

> A finding of fact in some cases is inseprable from the principles through which it was deduced. At some point, the reasoning by which a fact is "found" crosses the line between the application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment.

(cont'd)
is whether the District Court abused its discretion [see Lemon v. Kurtzman, 411 U.S. 192, 200 (1973); Jewel Tea Co. v. Kraus, 204 F.2d 549, 551 (7th Cir. 1953)]. Abuse of discretion occurs "when no reasonable person could take the view of the trial court." Harrington v. DeVito, 656 F.2d 264, 269 (7th Cir. 1981), cert. denied, 455 U.S. 993 (1982). But see McComb v. Jacksonville Paper Co., supra, 336 U.S. at 191 ("grant or withholding of remedial relief is not wholly discretionary" as "[t]he private or public rights that the decree sought to protect are an important measure of the remedy").

It may be assumed that the Court of Appeals would have reversed the determinations as "clearly erroneous" had it not focused instead on the District Court's misinterpretations of controlling legal principles and rules as a matter of law.

This instant case is one where it would have been appropriate for the Second Circuit to cross that line had the case required it. Cf. Mucha v. King, 792 F.2d 602, 605-06 (7th Cir. 1986) (distinguishing on jurisprudential grounds cases, such as the one before it, where "the only question is the legal significance of a particular and nonrecurring set of historical events," id. at 606).

Petitioners contend that their failure to have ever sought and been denied alternate places to house inmates, especially within the County, was a "strawman" set up by the Court of Appeals (29a). In fact, the petitioners produced no evidence that they had, claiming first that no suitable places were available within the County but later conceding that political problems (community opposition)

prevented them from seeking any. Nor was the applicability of New York Correction Law section 504(1) "illusory." The New York Court of Appeals has held that "over-population" in a jail triggers the provisions of section 504(1). In re Adams, 63 N.Y.2d 868, 870 (1984). The State Commission of Correction's role is, as petitioners relate, supervisory. It is the Sheriff who must exercise his discretion in identifying a substitute jail and requesting its designation. 9 New York Code of Rules and Regulations section 7300.6(b). That is precisely what he failed to do despite the Second Circuits pointed reminder in its decision directing entry of the remedial order. Badgley I, supra, 729 F.2d at 902 & n.9; cf. Miller v. Carson, 524 F. Supp. 1174 (M.D. Fla. 1981) (state agency authorized to contract with private hospitals for

bedspace). It ill-behooves the petitioners to waffle on this point now, claiming that an application for the designation of a specified substitute jail within the County, which they had not made, might be denied. See Petition at 10-11.

Petitioners also criticize the Court of Appeals for going outside of the present record to that of an earlier appeal in this case and citing testimony of the Administrative Judge of Nassau County regarding the absence of a conflict between petitioners' duties under State law and the remedial order directing them not to house inmates at the NCCC. Petition at 11. First, it should be noted that the petitioners did not object to references to that record until now. Second, the administrative judge's testimony was simply a summary of the

relevant State law. The courts do not remand to a particular facility, but to the Sheriff, who since the inception of this action has operated two jails within the County, only one of which is the subject of it. Under section 504(1), the Sheriff may use the jails of other counties, which he has done, or establish substitute or temporary jails within the County, which he finally did after the effective date of the Court of Appeals mandate herein.

The District Court apparently failed to understand that the prohibition on intake at the NCCC is just that and does not authorize, let alone require, the Sheriff to refuse custody of inmates remanded to him. In any event, an attack on the remedial order could not be mounted in the instant civil contempt proceeding. See Maggio v. Zeitz, 333 U.S. 56, 69 (1948);

Oriel v. Russel, 278 U.S. 358 (1929).

It would appear, however, that what initially "foster[ed] the experiment with disobedience" [Maggio v. Zeitz, supra, 333 U.S. at 69] was the District Court's adamant refusal to accept the State's division of responsibility for prisoners between the counties and the central government. Despite the Second Circuit's holding on this issue in Badgley I, supra, 729 F.2d at 900-01, a record devoid of any indication of State responsibility, and the governance of this case by consent judgment since 1981, the District Court's decision invited the parties to litigate the constitutionality of conditions at the NCCC so that the State, assuming some unknown basis for its liability would materialize, could be made to effect for the County compliance with the consent judgment (21a).

Given the predilictions of the District Court, it is not surprising that the standard imposed by it was watered-down beyond even whether petitioners had "the present ability to comply with the court's order in any meaningful sense." See United States v. Wendy, 575 F.2d 1025, 1031 (2d Cir. 1978) (finding Wendy had the ability to comply "technically" but "realistically" was incapable of doing so, id. at 1030). Arguably, the standard in the instant case should have been absolute because of the unequivocal directive in paragraph 31. Assuming, however, petitioners' "momentary inability to comply," that "cannot be deemed 'impossibility'", for "[if it were, defendants would evade court orders simply by refusing to take preliminary steps toward compliance . . . ." Fortin v. Commissioner, 692 F.2d 790, 797, n.9 (1st

Cir. 1982); cf. United States v. Swingline, 371 F. Supp. 37, 44 (E.D.N.Y. 1974) (where, as here, the proof showed at most "that performance was difficult and that it would have required more intensive effort than [the County] was willing to devote to the task").

In sum, petitioners demonstrate no usurpation of the fact finding function warranting a writ of certiorari. Rather, the Court of Appeals appropriately reviewed its own equitable order, which had subsequently been incorporated into the amended consent judgment.

II.

The Second Circuit's direction neither espoused a "'hostage' theory of contempt" nor conflicts in the least with the decision of another court of appeals.

The Eleventh Circuit's decision in Newman v. Graddick, 740 F.2d 1513 (11th Cir. 1984), reversed a contempt order against the Alabama Attorney General. The Attorney General, however, was not a signatory of the consent decree there (Id. at 1517) and had not violated any specific orders of the court (id. at 1529). Nor did he have the ability to bring the prison system into compliance with the orders of the court. Id. at 1528. Finally, while he may have placed "stumbling block[s]" in the paths of others (id. at 1527), the citation was held to be impermissible in that these were "either activit[ies] for which the Attorney General could not be held directly responsible or conduct not

clearly violative of the order." Id. at 1529.

In sharp contradistinction, petitioners herein were signatories of the consent judgment in 1981 and of its amendment in 1984 and ignored specific directives prohibiting them from taking actions completely and exclusively within their control.

It was petitioners' burden to show "categorically and in detail" that compliance was impossible. United States v. Rylander, 460 U.S. 752, 755 (1983). The record is devoid of any evidence of efforts, however minimal, towards the establishment of a substitute facility within the County. Also conspicuously absent is any evidence of the Nassau County Executive or Board of Supervisors or any other County official or agency failing to cooperate with them in this or

in any other regard. In fact, the money for the five-year construction program had already been appropriated when the agreement to the amended judgment was signed by them in 1984.

Petitioners contend that the direction to the Sheriff is particularly unfair because under New York law he is personally liable for fines or damages incurred by him. Petition at 18. While petitioners do not hesitate to go outside the record to bring other matters to the Court's attention, they neglect to advise that in an order dated October 17, 1986, consented to by respondents and the County of Nassau, the County was added as a party to this action for the express purpose of eliminating any doubt as to its liability for any actions of the Sheriff with relation to the mandate.

In sum, the Second Circuit was fully

congnizant of the Sheriff's lack of control over the flow of inmates remanded to him. The court's recognition that cooperation by other governmental entities would be desirable and might be induced [see Badgley I, supra, 729 F.2d at 902; Badgley v. Santacroce, 800 F.2d 33, 37 (2d Cir. 1986) (29a)] cannot seriously be argued to detract from the orders' effectiveness or suitability.

III.

The coercive sanction directed in the mandate is neither arbitrary nor ambiguous, or otherwise improper.

Contrary to the petitioners' assertions, the Court of Appeals' direction to the District Court to "hold the county defendants in civil contempt in the event of any subsequent failure to implement paragraph 31 of the amended consent judgment and, in that event, to assess compensatory damages in favor of the plaintiffs of not less then $5000 for each person admitted to the NCCC in violation of the amended consent judgment . . ." (emphasis added) (27a) although phrased as compensatory damages, was clearly intended to coerce future compliance with paragraph 31.

Judicial sanctions in civil contempt proceedings "may be employed for either or both of two purposes: to coerce the defendant into compliance with the court's

order, and to compensate the complainant for losses sustained." United States v. United Mine Workers, 330 U.S. 258, 303-304 (1947). By phrasing the direction in terms applicable to future events, the Court of Appeals indicated an intention neither to punish the defendants for their past contemptuous behavior nor to compensate plaintiffs for actual loss resulting. Rather, painfully aware of the petitioners' six year history of "beaurocratic excuse and delay" (24a), the court obviously considered the "character and magnitude of the harm threatened by [the] continued contumacy" [United States v. United Mine Workers, supra, 330 U.S. at 304] and directed sanctions sufficient to assure compliance, for which of course there is no necessity of proof of actual harm.

The prospective direction has, to date,

had its desired effect. As related in Point IV of the petition, since entry of the mandate, petitioners have constructed a temporary modular building, which has contributed to reducing the in-house population and together with other actions taken thus far prevented the imposition of sanctions.

In the event the Court of Appeals intended the fine, if one is required, to be paid directly to the plaintiffs as compensation, the Court has affirmed such fines when they serve to "vindicate[d] the [District] Court's authority over a recalcitrant litigant." Hutto v. Finney, 437 U.S. 678, 691 (1978). In Hutto v. Finney, the lower court awarded attorney's fees for bad faith without regard for the actual cost of compensating counsel. In affirming, the Court wrote:

"[c]ompensation was not the sole motive

for the award . . . . [W]e see no reason to distinguish this award from any other penalty imposed to enforce a prospective injunction." Id. Thus, although an award is termed compensatory, it may be coercive and prospective in nature.

Furthermore, as petitioners contend, there must be a nexus between the sanction imposed and the correction of a violation. They cite as authority for a supposedly insufficient nexus herein, the Third Circuit's decision in Inmates of Allegheny County Jail v. Wecht, 754 F.2d 120 (3rd Cir. 1985), a case which is clearly distinguishable.

In Inmates of Allegheny County Jail v. Wecht, the Third Circuit overturned a sanction which required the county to pay $5000 for each prisoner released to comply with the population limits in the jail. This "contempt" sanction was aimed at

"coercing the County into spending funds needed to develop and implement a plan for an alternative housing arrangement." Id. at 129. However, under the terms of the court's prior order, the County was never given "any specific direction to prepare and implement an alternative plan for housing inmates." Id. As the Third Circuit stated, "wishes are not orders", and thus a finding of contempt and the $5000 penalty per inmate released was inappropriate, as the sanction was not for the enforcement of any order and as the County was fully complying with all orders.

In the instant case, on the other hand, a specific order had not been followed, and as argued above, the Second Circuit properly refused to excuse such non-compliance.

The Second Circuit declared that the injunction contained in paragraph 31 was

to be operative thirty days after the date of its decision and that any subsequent failure to implement it would result in the assessment of damages. Federal courts should not be reduced to issuing injunctions and hoping for compliance: "Once issued, an injunction may be enforced. Many of the court's most effective enforcement weapons involve financial penalties . . . . Civil contempt proceedings may yield a . . . fine." Hutto v. Finney, supra, 437 U.S. at 690; see United States v. United Mine Workers, supra, 330 U.S. at 305. Thus, the mandate of the Second Circuit, was appropriate in light of the violations that had previously occurred.

Petitioners' attempt to buttress their argument by stating that certiorari should be granted because of the lack of specific guidelines for implementation is

meritless. Nothing in the Second Circuit's decision prevents the District Court from specifying how the collected fines should be spent. The mandate does not even suggest that the fines must be paid directly to the plaintiffs.

Fines for contempt have been used, in various ways, to implement the aims of injunctions or to "redress the situation originally complained of by plaintiffs." Haldeman v. Pennhurst State School and Hospital, 526 F. Supp. 423, 427 (E.D. Pa. 1981). Authority exists for the creative use of fines collected in a variety of cases including some concerning jail overcrowding. For instance, in Mobile County Jail Inmates v. Purvis, 581 F. Supp. 222 (S. D. Ala. 1984), the court used a portion of collected fines to pay

bail bond fees. Id. at 225.[4] See also Benjamin v. Malcolm, No. 75 Civ. 3073 (S.D.N.Y. Oct. 31, 1983). In Halderman v. Pennhurst State School & Hospital, supra, the court used the contempt fines to compensate special masters. Nothing prevents the District Court from fashioning a method for disbursement of the funds in accordance with the goals of the amended consent judgment.

Finally, the petitioners argue that other problems with the mandate are increasingly likely to occur. However, the situations posited do not conern the recent mandate, but rather paragraph 31

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[4] After the contempt was purged by completion of the extensive construction required, the court returned to the County $4,000,000 which had accrued at a rate of $5000 per day. See Mobile County Jail Inmates v. Purvis, 600 F. Supp. 788 (S.D. Ala. 1985).

itself, a remedial provision ordered by the Second Circuit in 1984 and agreed to by the petitioners in the amended consent decree. The instant decree was signed with full knowledge by all parties that the total population fluctuates a great deal on a daily basis and peaks at various times of the year. Not having sought review of Badgley I, and having obtained the benefits of the consent decree, the petitioners should not be permitted to ignore the affirmative obligations imposed by it without the imposition of penalties. See Berger v. Heckler, 771 F.2d 1556, 1568 (2d Cir. 1985).

As the clear intent of the mandate was to coerce future compliance with paragraph 31 and the District Court is free to fashion a reasonable disbursement of funds, certiorari should not be granted.

IV.

The Court of Appeals followed this Court's policy of judicial restraint toward the administration of correctional facilities.

To avoid intruding too sharply into matters of largely state and local concern, the Second Circuit entered an order in the fourth year of this litigation which it expected would secure respondents their rights and induce parties and non-parties alike to face up to the challenge presented by the crisis at NCCC. Badgley I. The court rejected more radical proposals for orders requiring the release of inmates. Badgley I, supra, 729 F.2d at 901-02. Such orders, it should be noted, had been entered by other courts on less compelling records. See Duran v. Elrod, 713 F.2d 292 (7th Cir. 1983); Benjamin v. Malcolm, 75 CIV 3073 (S.D.N.Y., November 4, 1983). The less intrusive order herein, like that

in Ruiz v. Estelle, 679 F.2d 1115 (5th Cir.), modified on other grounds, 688 F.2d 266 (1982), cert. denied, 460 U.S. 1042 (1983), was in conformity "with the doctrine that a court must exercise '[t]he least possible power adequate to the end proposed.'" Shillitani v. United States, 384 U.S. 364, 371 (1966), quoting, Anderson v. Dunn, 6 Wheat 204, 231, 5 L.Ed. 242, 248 (1821).

Implementation of the remedial order, which in turn enforces the population cap and was incorporated into the amended consent judgment, is now challenged by petitioners as "need less interference", as only based on a consent judgment anyway, and as no longer necessary because it has worked thus far.[5] These claims do

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[5] With respect to the Sheriff's "financial ruin" (Petition at 24), the Court is respectfully referred to the revelations in Point III, supra.

not justify granting a writ of certiorari.

Two and one-half years after its decision in Badgley I, the Court of Appeals, confronting blatent disregard of its enforcement order, again declined more intrustive approaches proposed. Rather, the court held that paragraph 31 would become operational 30 days after entry of the mandate and that any subsequent violations would be punishable by contempt and sanctions (32a-33a).

The restrained approach of the Court of Appeals in Badgley I, and again in Badgley II, are entirely consistent with the principles outlined by the same court in Dean v. Coughlin, 804 F.2d 207 (2d Cir. 1986).

The assertion by petitioners that since there are no proven constitutiona deficiencies to remedy, the court should

be even more circumspect is fatally flawed. As the Court recently noted, "a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial . . . ." Local Firefighters v. Cleveland, 478 U.S. ____, ____, 92 L.Ed.2d 405, 421 (1986). The Second Circuit, in fashioning the mandate it did, sought merely to coerce the petitioners into compliance with what they had previously agreed upon. In enforcing its orders, "a court has broad discretion in the context of contempt to fashion an order to coerce compliance with a prior judgment." Perfect Fit Industry, Inc. v. Acme Quilting Co., 673 F.2d 53, 56-57 (2d Cir.), cert. denied, 459 U.S. 832 (1982).

Consent judgments have attributes of both contracts and judicial acts [see

United States v. ITT Continental Baking Co., 420 U.S. 223, 236 (1975)]; they are entered after careful negotiation has produced agreement as to their precise terms. See United States v. Armour & Co., 402 U.S. 673, 681 (1971). The court is not at liberty to expand or contract the agreement absent a motion to modify. See Berger v. Heckler, 771 F.2d 1556, 1558 (2d Cir. 1985).

If petitioners have "come forward with a reasonable plan" (anticipated completion of a 300-bed modular facility, a system of bail review, electronic surveillance at home, and construction of a temporary 80-bed modular building) (Petition at 23), as theyclaim, first on the heels of the plaintiff's motion for a finding of contempt and then after the Second Circuit's recent mandate, it only further proves the effectiveness and

appropriateness of the court's orders, and the possibility of compliance. See Pesaplastic, C. A. v. Cincinnati Milacron Co., 799 F.2d 1510, 1522 (11th Cir. 1986).

CONCLUSION

For these reasons a writ of certiorari to review the mandate of the United States Court of Appeals for the Second Circuit in Badgley v. Santacroce should be denied.

Dated: Mineola, New York
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